Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-752

Certified Meats, Inc., and
Country Pride, Inc.,.....Petitioners

v.

National Labor Relations Board..Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gregory M. Novak
Attorney for Petitioners
325 N. Elizabeth Street
Lima, Ohio 45801
Telephone: (419) 228-5228

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The Petitioners, Certified Meats, Inc., and Country Pride, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 13, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 13, 1979, and this petition for certiorari was filed within ninety (90) days of that date. This Court jurisdiction is invoked under 28 U.S.C.§ 1254 (1).

QUESTIONS PRESENTED

1. Whether the decision of the National Labor Relations Board is manifestly against the weight of the evidence.

2. Whether the hearing conducted by the Administrative Law Judge was biased and whether such a hearing is a denial of due process.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C.[and Supp V] 151, et seq are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities...
>
> Sec. 8 (a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

STATEMENT OF THE CASE

On October 17, 1972, the National Labor Relations Board issued its Decision and Order directing Respondent, Certified Meats, Inc., to reinstate certain of their employees and make them whole for wages lost due to discrimination by the Respondent, Certified Meats, Inc. The

Court of Appeals for the Seventh Circuit enforced this order as against Certified Meats on August 3, 1973. On April 8, 1976, the Regional Director of Region Twenty-five issued a Back Pay Specification and Notice of Hearing to Certified Meats, Inc. The Specification was answered by Certified Meats on May 13, 1976, and an amended answer to same was made on May 24, 1976. The Regional Director on August 2, 1976 amended the original Back Pay Specification and Notice of Hearing to include Respondent, Country Pride, Inc. It was alleged in this amendment that Country Pride was a successor to Certified Meats and liable for any Back Pay due the discriminatees. Country Pride moved to be dismissed from the proceedings and filed an answer denying its successorship. The motion was never ruled upon.

On February 15, 16 and 17, 1977, hearing was had on the Back Pay Specification before the Honorable James T. Youngblood in Fort Wayne, Indiana. Evidence was presented herein. During the course of the proceedings, Administrative Law Judge Youngblood withdrew himself from hearing the case. He, however, reconvened the hearing and continued to hear evidence. Further, while conducting the hearing, Judge Youngblood repeatedly interrupted Respondent's counsel's cross-examination. The Administrative Law Judge required briefs which were submitted by Certified Meats, Inc. and Country Pride, Inc., on April 18, 1977, and by General Counsel on April 14, 1977. Judge Youngblood rendered his decision on January 23, 1978.

The contents of that decision culminated in an order running to both Certified Meats, Inc.,

and Country Pride, Inc., holding both jointly and severally liable and instructing payment by both to the discriminatees.

The petitioners made application for review in the U.S. Court of Appeals for the Seventh Circuit. An appellate review was held resulting in the July 13, 1979 decision. It is that decision which has prompted this appeal.

In the course of the original hearing the petitioners gave multiple explanations of the prevailing business and economic conditions and indicated why no transfer of an operative business was possible. The Board followed the recommendations of the Administrative Law Judge and chose to ignore the economic realties in favor of pursuing its goal of finding a remedy for the discriminatees.

REASONS FOR GRANTING WRIT

1. The decision below conflicts with the substantial volume of evidence as presented at the administrative hearing.

As provided under 29 U.S.C. § 160 E and 29 U.S.C. 160 (G), the findings of the National Labor Relations Board with respect to questions of fact shall be conclusive only if supported by substantial evidence on the record considered as a whole. It is the petitioners belief that such evidence is inconsistent with the decision returned.

The question of this evidence and successorship clearly indicates the original corporation, Certified Meats, Inc., was for several reasons incapable of transfering any live or operating business to Country Pride, Inc.

It was the direct and obvious intent of William D. Contris that all of the operations

of Certified Meats, Inc., end. Towards the realization of that purpose the ownership of the company was transfered to another party for no more than the assumption of existing indebtedness. It is apparent that there was no vital operation of the business of Certified Meats, Inc., there can be no successor to any business unless there is something to which that second corporation can succeed.

It is recognized that an employer has a right to terminate his business for whatever reason he may choose. This principle is established in Textile Workers v. Darlington Manufacturing Co., Inc., U. S. Sup. Ct. 1965 38 LRRM 2657.

The facts of this case as indicated in the record clearly indicate that Certified Meats, Inc. was defunct at the time of its transfer and that its vitality or life's breath had ceased.

In insisting upon finding Country Pride, Inc. as a successor corporation the National Labor Relations Board is attempting to use an innocent party as the means for the realization of a goal that the realities of the business world had rendered impossible.

With the demise of Certified Meats, Inc., the decision of the Board became unenforceable. Such was the case in NLRB v. Grace Co., 184 f. 2d 126, 26 LRRM 2536 (8th Cir 1950) where it was held that termination can serve to end the employers obligation and in this case the facts can hardly suggest otherwise.

We confess an undeniable repugnance for this entire question of successorship. This "visiting the sins of the father" approach flies in the face of our natural inclination to attribute guilt only to those who have actively or passively commited some wrong. There may be some justification for using the question of successorship as an enforcement tool but it must not be allowed to

to ignore or deny the facts of economics, to insist upon using a second corporation as a means of achieving the Board's end when no other means are available. It must be applied to situations in which there is a genuine successorship, where there is clearly an intent to transfer a living and functioning business entity. To allow the title of successor corporation to be applied without the proof of such transfer would enable the Board to attach any purchaser of materials or equipment from a defunct corporation and to impose liability for acts that they did not perform and over which they had no control.

The matter of successorship as a weapon in the hands of the National Labor Relations Board represents a terrifying threat to the transfer of any property or interest of every company in this nation which experiences labor difficulties.

The use of successorship must be narrowed so that the facts of a given situation indicate a clear intent to transfer an operative, if not operating, business.

An examination of the record of the case below, in its entirety, fails to demonstrate that such an intent was present in this case. Rather, it suggests the opposite. It establishes that no living business was transfered, that business and material conditions existing at the time of the alleged transfer prevented any transfer of such a living business.

This issue stands awaiting resolution. Its impact continues well beyond the confines of this particular case. Now is the time to check this abuse at the hands of the National Labor Relations Board.

2. The decision below denies the due process of law.

One of the traditional strength of the American form of government has been the division of that government into executive, legislative and judicial branches with appropriate restrictions upon each branch provided by the nature and operations of the other branches.

Administrative law by its very nature blurs the distinctions which traditionally have served as checks and balances in the operation of our government. There may be acceptable reasons for such a blurring but it remains a fact that when such a blurring occurs there arises the clear possibility, if not certainty,that the rights and privileges inherently protected by the division into branches (and checks and balances) if they are to survive, must be protected by some other means.

It is precisely for that purpose that we seek the review of this matter by the Supreme Court.

The operations of the National Labor Relations Board while ostensibly conducted under the classification of civil actions place the authority, power and means of the United States Government directly in conflict with individuals and businesses. In many respects the actions of the National Labor Relations Board more accurately resemble criminal investigations and prosecutions than our traditional civil actions.

As indicated in Marshall v. Barlow's Inc., 98 S. Ct. 1816 (1978) there is a recognition by the court of the need to place restrictions upon the actions of federal administrative bodies in the conduct of their activities. The reason is fundamental. The constitutional guarantees were created expressly to limit the infringement of

individual liberties by government. The change in form and method which is apparent in the tendency towards administrative versus judicial reconcilliations does not eliminate the need for constitutional protections against government. Perhaps the subtleties of administrative actions increase that need.

In this special case we are faced with a situation in which the National Labor Relations Board acts both in an executive and judicial capacity. Our concern in this is that the actions of the Board in its judicial capacity does not provide the necessary constitutional guarantee of due process owing to the actions and expressed bias of the Administrative Law Judge.

It is not alleged that the proceedings were of a criminal nature. It is alleged that the proceedings owing to the position and power of the National Labor Relations Board denied the petitioners a fair and impartial hearing.

Specifically, the petitioners are concerned by the continued and repetitive interruptions by the Administrative Law Judge and the resulting denial of effective cross-examination. We are also concerned with the bias of the Administrative Law Judge as admitted in his withdrawal in the case and then as denied by his reconvening and hearing of the case.

In that hearing the Administrative Law Judge served as the trier of legal issues as well as the trier of fact.

As indicated in Rosenblum v. Rosenblum, 42 N.Y.S. 2d 626, 181 Misc. 78 (1942):

> "The due process of law provision of this Amendment (the 14th) and Amendment 5 guarantees to every person his day in court and reasonable opportunity to be heard or defend and it requires orderly proceeding in competent

tribunal in accordance with generally established rules not violative of fundamental rights."

It is the position of the petitioners that the proceedings before the Administrative Law Judge denied the petitioners of the fundamental rights to adequately present a defense, to properly cross-examine witnesses and to have a fair and impartial hearing. The proceedings were such that the Administrative Law Judge by his actions of interruption and withdrawal and reconvening denied the petitioners of the required objective proceedings necessary for a fair and impartial hearing.

Consider the matter of U.S. ex rel Montgomery v. Ragen, 86 f. Supp. 383, D. C. Ill. (1949):

> "Due process of law identifies itself with due course of justice and means not only the due conviction and punishment or the due acquittal and discharge of an accused person, as justice may require, but it also means the due course of proceedings, in the administration of justice."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

Gregory M. Novak

Gregory M. Novak
Attorney for Petitioners
325 N. Elizabeth Street
Lima, Ohio 45801

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued May 21, 1979)

July 13, 1979

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. JOHN W. PECK, Senior Circuit Judge*

Hon. HARLINGTON WOOD, JR., Circuit Judge

CERTIFIED MEATS, INC., and COUNTRY PRIDE, INC.,		
	Petitioners	Petition for
No. 78-1807	v.	Review of an Order of the
NATIONAL LABOR RELATIONS BOARD,		National Labor Relations Board
	Respondent	

ORDER

Certified Meats, Inc. (Certified) and Country Pride, Inc., (Country Pride) (the Companies) petition this court to review and set aside a supplemental decision and order of the National Labor Relations Board, 235 N.L.R.B. No. 184 (1978), and the Board cross-applies for the enforcement of the order. In 1972 the Board found

that Certified violated Section 8(A) (3) and (1) of the National Labor Relations Act by the company's discriminatory discharge of eleven employees. Certified Meats, Inc., 199 N.L.R.B. 775 (1972). The Board's order required, inter alia, that Certified offer reinstatement to two employees and make whole those employees, as well as nine other employees who had already been offered reinstatement, for any of loss of earnings suffered because of the unlawful discharges. In 1973 this court enforced the Board's order, NLRB v. Certified Meats, Inc., No. 73-1096 (7th Cir. 1973), and in April 1976 the Board's Regional Director issued a back pay specification and notice of hearing against Certified detailing the amounts of money claimed as due to the employees. In August 1976 the Regional Director amended the back pay specification and notice of hearing alleging that Country Pride, by acquiring and continuing the business of Certified , was a successor to Certified and was therefore jointly and severally liable for remedying Certified's unfair labor practices. After a hearing an administrative law judge concluded that Certified and Country Pride were jointly and severally responsible for remedying the unfair labor practices and making whole the employees in the amount of about $15,000.00. 1/ On May 1, 1978, the administrative law judge's decision was adopted by the Board.

The petitioners raise two issues on appeal: (1) whether substantial evidence in the record as a whole supports the Board's finding that Country Pride is a successor employer, and (2) whether Certified and Country Pride were denied due process by the administrative law judge's conduct of the hearing.

I.

The Supreme Court ruled in Golden State Bottling Co. v. NLRB, 414 U. S. 168, 180-84 (1973), that the Board may require a bona fide purchaser to reinstate with back pay employees unlawfully discharged by a predecessor employer where the successor employer: (1) acquires the employing enterprise with notice of the unfair labor practice, and (2) retains "substantial continuity of the identity in the business enterprise." The latter requirement may occur when the successor employer acquires substantial assets of the business enterprise and continues, without interruption or substnatial change, the business operations of the predecessor. Id. at 184.

The companies contend that there was an insufficient showing of successorship under the second requirement of Golden State. 2/ They claim that: no operations were conducted for over 30 days at the Fort Wayne, Indiana facility, the very nature of the essential operations was different because Certified produced only diced beef while Country Pride produced beef short ribs in large amounts and diced beef in small amounts as a by-product of short ribs, only two employees were common to both companies, and the corporate entities were incorporated in different states. 3/

The Board argues, first that Country Pride acquired the business and substantial assets of Certified with notice of Certified's unfair labor practices. Second, the Board asserts that Country Pride maintained a "substantial continuity of identity" in the business enterprise. We agree with the Board.

The record shows that when Certified began operations in 1971 in Indiana, William D. Contris, Karen Sue Hufford and their attorney were

Certified's incorporators and Board of Directors. Contris served as Certified's president and Karen Hufford was the secretary-treasurer. Contris owned 100 per cent of the Certified stock. The acquiring company, Country Pride, was incorporated in 1972 in Ohio. Contris owned, and still owns, 400 of the 600 shares, or two-thirds, of Country Pride's stock and Karen Hufford's brother, Steven Hufford, owns the remaining 200 shares. At the time of the back pay hearing, Karen Hufford was Country Pride's president and Contris was the secretary-treasurer. Moreover, Contris, along with Karen and Steven Hufford, were all witnesses at Certified's unfair labor practice hearing. The record also shown that Country Pride acquired substantially all of Certified's physical assets in 1973, including Certified's compressors, refrigeration units and incinerator. The lease continued in Certified's name and the utilities remained billed to Certified. Country Pride, meanwhile, assumed Certified's rent and utility payments for the Fort Wayne plant. Further, Country Pride continued to use Certified's Department of Agriculture Inspection Number, 6900, until 1975 when operations closed at the Fort Wayne plant. The fact that Country Pride hired employees from Certified supports, rather that upsets, the finding of substantial continuity of the business enterprise. Last, we, like the administrative law judge, are unpersuaded by the Companies' contention that there was no substantial continuity under Golden State because Certified produced only diced beef while Country Pride produced beef short ribs in large amounts and diced beef in small amounts. This is a distinction without a significant difference. Each

company was engaged in beef processing; Country Pride continued to produce large quantities of diced beef--38,000 pounds in one instance; and Country Pride continued to sell diced beef to some of the same customers.

We have carefully and thoroughly examined the record as a whole and we conclude that substantial evidence supports the Board's finding that Country Pride is a successor employer.

II.

The companies claim in their brief that because the administrative law judge "continually interrupted respondent's counsel's cross-examination of National Labor Relations Board witnesses," the Companies were denied the right to a fair hearing, the right to effective counsel and the right to confront witnesses. The petitioners, however, are unable to cite a single authority in direct support of the assertions and they fail to point out a specific instance where the administrative law judge prevented counsel from obtaining testimony from a witness. The administrative law judge on occasion interrupted both the petitioners' and respondent's questioning of witnesses, but the record does not show, and the petitioners do not allege, that the examiner was hositle, biased or prejudiced in either his questions to the witnesses of his findings of fact. See generally, NLRB v. Air Flow Sheet Metal, Inc., 396 F.2d 506, 508 (7th Circ. 1968); A.O. Smith Corp. v. NLRB, 343 F.2d 103, 110 (7 Cir. 1966). We have examined the record as a whole and, finding no unfairness in the hearing, we will not order a new hearing.

The Board's order of May 1, 1978, adopting the administrative law judge's supplemental decision, is enforced.

*Honorable John W. Peck, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

1/ The administrative law judge, and later the Board, ordered that Certified and Country Pride pay back pay, plus interest, to ten of the eleven employees unlawfully discharged by Certified. The eleventh employee was not found entitled to back pay.

2/ The Companies have not contested the Board's finding that Country Pride acquired Certified with notice of Certified's unfair labor practices.

3/ The Companies also assert that the Board had not demonstrated that the acquisition by Country Pride was inspired by Certified's desire to circumvent the Board's order. The Supreme Court has made it clear that no such showing is necessary in proving successorship. Golden State Bottling Co. v. NLRB, 414 U.S. 168, 176-177 (1973).

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 1979, three (3) copies of the Petition for Writ of Certiorari were mailed postage prepaid to Elliot Moore, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D. C. and three (3) copies to Solicitor General, Department of Justice, Washington, D. C. 20530.

Gregory M. Novak

Gregory M. Novak
Attorney for Petitioners
325 N. Elizabeth Street
Lima, Ohio 45801